IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	**CASE NO. 1:16-CR-00365**
	:	
Plaintiff,	:	**JUDGE SARA LIOI**
	:	
v.	:	
	:	
DANIEL J. MERCEDE,	:	
	:	
Defendant.	:	

DEFENDANT DANIEL G. MERCEDE'S SENTENCING MEMORANDUM

I. INTRODUCTION

Defendant Daniel J. Mercede is a 29-year-old man who has pled guilty to one count of bank fraud, one count of access device fraud, and one count of operating an unlicensed money transmitting business. For the reasons set forth below, Mr. Mercede requests that this Court impose a sentence of 57 months, which is the low end of a total offense level of 25 and a Level I Criminal History Category.[1] Additionally, the Presentence Investigation Report states that Mr. Mercede's documented history of mental health and substance abuse issues may be grounds to vary from the recommended guideline sentence. Mr. Mercede further requests that this Court recommend his admission to the BOP's Residential Drug Abuse Program ("RDAP") to provide him with services to help him maintain his sobriety. Mr. Mercede submits letters from his

[1] As set forth below, Mr. Mercede submits that his Criminal History Category should be a Level I rather than a Level III because his two misdemeanor DUI convictions substantially overrepresent the seriousness of Mr. Mercede's criminal history or the likelihood that he will commit other crimes.

family, friends, and mental health professionals to assist this Court in determining an appropriate sentence.

II. STATEMENT OF FACTS

A. Mr. Mercede's Offense

Mr. Mercede was charged in a Complaint on May 17, 2016 and arrested that same day. (ECF No. 1, 5.) On May 25, 2016, he was released on a $250,000 bond secured with conditions. (ECF No. 10.) Since that time, he has been on home detention and electronic monitoring by U.S. Pretrial Services and has complied with all court-ordered conditions of release.

Mr. Mercede executed the Plea Agreement in this case and was charged in an Information filed on November 22, 2016. (ECF No. 28.) Mr. Mercede was arraigned on December 8, 2016 and entered a plea of guilty. (ECF No. 31.) The offense conduct is set forth in the Information, and Mr. Mercede acknowledges that the facts contained in the Information are accurate. Mr. Mercede accepts full responsibility and expresses great remorse for the poor decision-making he exhibited in connection with the charged offenses, as demonstrated by his written statement below:

> I sincerely regret the poor decisions I made and accept the consequences of what I have done. Other than my family and close friends, I have lost all that matters to me. My actions have devastated my family, both emotionally and financially, and caused untold worry to many innocent victims. I have worked hard to address my mental health and alcohol addiction issues, take full responsibility for my actions, and humbly ask this Court to consider these factors – as well as my responsibilities to care from my family – at sentencing.

Mr. Mercede's written statement of acceptance of responsibility goes beyond mere words to this Court. Indeed, many of Mr. Mercede's family members and friends have written to this Court to recount their firsthand observations of Mr. Mercede's regret and shame for his criminal actions. For example, Mr. Mercede's wife says that she has "seen how he sincerely regrets having committed this crime. He knows in his heart he has done something wrong and feels deeply ashamed. He has learned this mistake has not only affected himself but his wife, son, and family as well." Mr. Mercede's father similarly says that "Daniel has made a big mistake and he has expressed to me sincere regrets for having committed these offenses. He does understand that he must be accountable for the consequences of his actions." Mr. Mercede's aunt says that Mr. Mercede expressed to her at his wedding "that he is highly remorseful for his actions." Michael and Patricia Butler, Mr. Mercede's longstanding family friends, also write that Mr. Mercede "is upset about what happened and is remorseful."

B. Personal History of Mr. Mercede

Mr. Mercede is 29 years old and was born in Danbury, Connecticut. His parents have been happily married since 1974, and he is their fourth child. (*See* PSR ¶ 96.) Mr. Mercede's family moved to Chagrin Falls, Ohio when he was a child, and he grew up in a loving home with a large extended family. Indeed, many of Mr. Mercede's family members and friends have submitted character reference letters to this Court attesting to Mr. Mercede's character and devotion to his family. These letters are submitted to this court *in camera* and are discussed below.

After Mr. Mercede's freshman year in high school, his father obtained a new position that required him to move to Switzerland. Mr. Mercede's cousin, Rick Rancourt, explained that "as an American high school student, Dan had little interest in moving abroad away from him friends and sports … but ultimately Dan decided that it was best for him to move with his parents as he has a strong understanding of the importance of family." Mr. Rancourt adds that "I think Dan understood it was a challenging decision for the whole Mercede family and knew the importance of working together and supporting loved ones." By all accounts, Mr. Mercede adjusted well to high school life in Switzerland. He was unanimously chosen by his classmates at the International School of Lausanne to provide the class speech at his senior graduation ceremonies. Indeed, Mr. Mercede's IB Economics teacher, student council advisor, and academic counselor, Franko Cifizzari, describes Mr. Mercede as:

> a charismatic young man with great integrity who displayed commitment to his academic studies, and indeed, to all other aspects of school life during this time. He was actively involved in the school community, always willing to help others. I remember Dan as someone who learnt from his mistakes, listening to feedback and then incorporating this feedback to improve in his future work or projects. His other teachers and I were most impressed with his work ethic, his determination, and his responsible approach to his academic studies. He set himself the highest personal goals. I was his IB extended essay supervisor and observed first hand his analytical mind, his insight and willingness to go further than expected. He pushed himself to excel and had high expectations of himself. In the classroom, he was an excellent student, attentive and engaged. He had an excellent sense of humor and a big heart. Most importantly, Dan was a polite young man with great potential. … His positive demeanor and wiliness to help others were demonstrated as the senior class representative to the student council; he was a great role model for the younger students and was well respected amongst his peers and the faculty alike.

Mr. Mercede subsequently attended college at Queen's University in Ontario, Canada and earned a B.S. in Economics. Several of Mr. Mercede's college friends have submitted character reference letters to share their observations of Mr. Mercede's loyalty and caring nature. For example, Ahmad Iqbal says that "Dan is loyal like I have never seen in anybody else since graduating university. He would go far and wide to take care of his friends. When we lived together he would take care of us. He always cleaned up after us, and he always cooked for us. He was completely dedicated to his friends."

Mr. Mercede has struggled throughout high school and his adult life with substance abuse addiction. He began smoking marijuana at the age of 13 and progressed to smoking 1/8 gram on a daily basis until he graduated from college. (PSR ¶ 111.) Mr. Mercede started snorting cocaine and using Ecstacy and Adderall at the age of 23, and he continued to use both drugs until he was 27 years old. (*Id.* ¶ 112.) It was during this time that Mr. Mercede became aware of bitcoin; he used it to purchase illegal drugs online. (*Id.* ¶ 56.) Mr. Mercede's judgment was clouded due to his drug addiction. (*Id.*) Mr. Mercede also first drank alcohol at the age of 13 or 14, and while in college he was getting intoxicated four to five times a week. (*Id.* at 116.) After receiving a DUI in 2012 and another DUI in 2013, Mr. Mercede sought counseling and has maintained his sobriety since 2015.

In addition to his cocaine and alcohol addictions, Mr. Mercede has struggled with anxiety and depression since high school. (*Id.* at ¶ 104.) He decided to seek help in 2013 and began receiving services from a psychologist, Kathy Daum, and a psychiatrist, William Firkter, M.D. (*Id.*) Dr. Firkter diagnosed Mr. Mercede with Anxiety Disorder, Cocaine Dependence, and Alcohol Dependency. (*Id.* ¶ 110.) Dr. Firkter currently prescribes Venlafaxine (150 mg) for depression, Quetiapine (250 mg) for anxiety, and Clonodine for Mr. Mercede. (*Id.* ¶¶ 104, 110.) Mr. Mercede has seen Dr. Firkter on a monthly basis and Ms. Daum on a weekly basis since 2013 and diligently attended all scheduled sessions.

Mr. Mercede began a committed romantic relationship with Alecia Thompson in 2014, and the couple married in October 2016. Almost immediately after Mr. and Mrs. Mercede began dating, Mr. Mercede viewed – and treated – Mrs. Mercede's son, Caleb, who is now six years old, as his own child. Caleb's biological father died in January 2016, and Mr. Mercede is now in the process of adopting Caleb. It is clear to all who know Mr. Mercede that Alecia and Caleb are the center of Mr. Mercede's world. Significantly, virtually all of the character reference letters submitted to this Court mention Mr. Mercede's love for and commitment to Alecia and Caleb.

C. Testimonials Regarding Mr. Mercede's Character

The numerous character reference letters submitted to this Court are a testimony to Mr. Mercede's long-standing and deep devotion to his friends and family. These individuals provide their insights and experiences with Mr. Mercede to show his true nature and character and are crucial in determining an appropriate sentence.

Mr. Mercede's wife, Alicia, writes that she "has never met someone so thoughtful and caring" as Mr. Mercede. She says that he is "strong minded, big hearted, and often puts the needs of others first." Mrs. Mercede writes that her husband "immediately embraced" both herself and her son "as a family," and Mr. Mercede "became very involved and accepting with Caleb." Mrs. Mercede states that her husband works with Caleb to "excel at everything he does and helps him achieve his goals," and that he teaches Caleb "good morals, manners, and instills important life lessons," including "responsibilities and discipline." Mrs. Mercede says that Caleb and her husband do "many father-son activities" such as "game playing and cooking together." Mr. Mercede also "coached Caleb's baseball league and attends his school activities and sports." Mrs. Mercede says that "clearly there will be a big void in our lives when Daniel is away," and she asks for leniency during sentencing.

Significantly, many of the letters were written by individuals who have known Mr. Mercede his entire life and similarly recognize his abiding love and devotion to his family. For example, Mr. Mercede's father – a retired Chief Financial Officer at Nestle – writes that "[o]f our family members, I can say that I probably knew Daniel the best. You see, Daniel is not only my only son, but also one of my best friends." His father and mother have been living with Mr. Mercede, Mrs. Mercede, and Caleb since September 2016, and his father has seen firsthand how Mr. Mercede "has become very important in Alicia's and Caleb's lives, and they have become very important to Daniel." Mr. Mercede's father has noticed that, after being placed on home detention, "Daniel has been in a better mood since he was given the privilege to attend Caleb's activities (parent teacher conferences, walk Caleb to and from the school bus, play with him in the yard, attend his sports activities, and others)." In fact, Mr. Mercede's father says that "[n]ot only does Daniel take part in Caleb's activities, he also does all coordination and manages these activities for Caleb and Alicia." Mr. Mercede's father says that prior to Mr. Mercede's arrest, Mr. Mercede was "Caleb's team head coach or assistant coach for kid's baseball, soccer and football," and that "these things are very important to Daniel." Mr. Mercede's father also says that after the death of Caleb's biological father, "Daniel is the father figure that [Caleb] desperately needs in his life."

Mr. Mercede's mother, Virginia Mercede, also recognizes the deep and abiding love Mr. Mercede has for Alecia and Caleb and his other family members. Virginia observes that Daniel has been able to "fill the void" left by the death of Caleb's biological father. She says that "Caleb looks up to Daniel, respects and listens to him," and that Mr. Mercede has been "involved in all aspects of Caleb's upbringing from coaching little league to manners at the dinner table." She notes that "[r]emoving Daniel from this little boy's life for any great length of time could only have a negative effect."

Jennifer Mercede, Daniel's oldest sister, recognizes that "the crimes [Mr. Mercede] has committed are wrong and to be honest, I am disappointed with his choices." She says, however, that she "know[s] my brother to be of good character" and asks that this Court be lenient in sentencing for two reasons. First, she says, leniency is warranted because Mr. Mercede values family, as demonstrated by the fact that Mr. Mercede changed the date of his wedding so Jennifer could attend and surprised her by flying out to Oregon last year to celebrate her birthday. Second, Jennifer asks for leniency from this Court because Alecia and Caleb depend on Mr. Mercede. Jennifer says that she has witnessed "Daniel to be a positive influence on Caleb … providing structure, rules, and stability for him." Daniel's sister, Jaclyn, similarly says that Mr. Mercede is "a family guy" who "loves his parents fully, as well as his sisters, and now his beautiful wife and soon to be adopted son."

Numerous additional family members and long-time friends – including Darlene Mercede, Gail Borkowski, Michael and Patricia Butler, Michele Connor, Mary Lou and Mark Svencer, Theresa Mercede, Peg and Rick Eadie, Heather Bonisteel Schweitzer, Elizabeth T. Bonisteel, Jerry Thompson, Ashley Anne Glod-Hayes, and Rick Rancourt – similarly write movingly about Mr. Mercede's abiding love and devotion to his wife, son, parents, and sisters.

Character reference letters from Mr. Mercede's friends and family members who are part of the legal or addiction recovery community also provide important insights into Mr. Mercede's character and the efforts he has taken to facilitate his mental health and addiction recovery, as well as helping others do the same. For example, Aubrey Chamberlin served as a judicial law clerk to the Hon. R. Barclay Surrick of the U.S. District Court for the Eastern District of Pennsylvania and is currently a staff attorney for the Legal Aid Society of Nassau County in New York. She says she has observed Mr. Mercede's battle with addiction. Aubrey says he has seen the efforts Mr. Mercede has made to maintain a life of sobriety, has seen him "on many occasions remove himself from situations where alcohol threatened that sobriety," and notes that Mr. Mercede's commitment to the recovery process is "both commendable and rare." He also says that, "perhaps most admirable, Daniel gives back to his community by working with those in the earlier stages of recovery by serving as a mentor." Stanley Stone, the owner of Recovery for Resources, also writes that Mr. Mercede "has kept up with his sober living which includes helping other people with addiction issues."

From a clinical perspective, Ms. Daum writes that Mr. Mercede has been open and willing to address issues during the therapy process. She says that she has seen "progress in all life areas" and that "Mr. Mercede has shown significant growth by:

> 1) Remaining abstinent from all mood and mind altering chemicals.
>
> 2) Diligently attending all scheduled sessions.
>
> 3) Significant increase in interpersonal functioning with consistent open communication with family and significant progress in renewing and maintaining healthy lifestyle. He actively worked on improving his relationships with his parents and siblings and has renewed and established health peer relationships.
>
> 4) Resuming and maintaining relationships with friends.
>
> 5) Maintaining a loving relationship and later married his wife, Alicia.
>
> 6) Being a dedicated stepfather by actively participating in Caleb's parenting, scholastic needs, daily structure, meeting his recreational, social and emotional needs.

Ms. Daum concludes by stating that Mr. Mercede "has demonstrated a significant ability towards growth and change" and that he has "shown a willingness to be accountable for poor choices and consequences." She expressed her belief that Mr. Mercede "will continue to grow and, when his legal commitments are met, be a contributing member to society."

In all, these accounts and observations and those of many others set forth in the numerous character reference letters submitted to this Court show Mr. Mercede as he truly is: a man dedicated to his family and all others in need of help. In every letter he is described as a man who is kind, caring, compassionate, honest, and always puts his own personal interests aside for the sake of others. We ask that this Court take these letters into account when determining its sentence.

III. LAW AND ARGUMENT

A. Applicable Sentencing Law

In the wake of the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), a district court shall impose a sentence that is "sufficient but not greater than necessary" to achieve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). *See United States v. Foreman,* 436 F.3d 638, 644 n.1 (6th Cir. 2006) ("[A] district court's job is not to impose a 'reasonable' sentence. Rather, a district court's mandate is to impose 'a sentence sufficient, but not greater than necessary, to comply with the purposes of section 3553(a)(2)"). The Sixth Circuit has recognized that "the sentencing court must make an individualized assessment of the appropriate sentence based on the facts presented" and "the unique circumstances of each case." *United States v. Herrara-Zuniga,* 571 F.3d 568, 585 (6th Cir. 2009).

In *Gall v. United States,* 552 U.S. 38, 47 (2007), the Supreme Court rejected both "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range" and "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." Rather, district courts should begin by using the Guidelines range as a "starting point" and not "presume that the Guidelines range is reasonable"; a court must then make "an individualized assessment of the facts presented." *Gall,* 552 U.S. at 39; *see also United States v. Grossman,* 513 F.3d 592, 596 (6th Cir. 2008) ("*Gall* shows that the sentencing process involves an exercise in judgment, not a mathematical proof …."); *United States v. Bass,* 320 Fed. App'x 350, 355 (6th Cir. 2009) ("The court may not presume the guideline range is reasonable; rather it must make a fact-based individual assessment.")

The ABA standard similarly advises sentencing courts to impose "***the minimum sanction*** that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender."[2] As the Sixth Circuit has recognized, "one of the overarching purposes of the Sentencing Guidelines as set forth in an introductory Policy Statement" is to "achieve 'proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.'" *United States v. Farrow,* 198 F.3d 179, 193 (6th Cir. 1999) (quoting USSG Ch. 1, Pt. A, at 2.)

B. Guideline Calculations

The Plea Agreement provides for a base offense level of 29. (Plea Agreement ¶ 17.) The Plea Agreement also anticipates a three-level downward reduction for acceptance of responsibility and a one-level downward reduction for substantial assistance. (*Id.* ¶¶ 18, 21.) As a result, the parties agree that Mr. Mercede's total offense level is 25 before any departures or variances. While the Plea Agreement provides that neither party will recommend or suggest that a departure or variance is warranted (*id.* ¶ 14), it also states that the "Court alone will decide the advisory guideline range under the Sentencing Guidelines, whether there is any basis to depart from that range or impose a sentence outside the advisory guideline range, and what sentence to impose." (*Id.* ¶ 15; *see also* ¶ 13 ("the advisory guideline range will be determined by the Court at the time of sentencing").) The Plea Agreement further provides that "[t]he parties have no agreement about the Criminal History Category applicable in this case" and that "the Criminal History Category will be determined by the Court." (*Id.* ¶ 19.)

[2] American Bar Association Criminal Justice Standards, Sentencing Standard 18.6.1(a) (2014) (emphasis added), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_blk.html #6.1.

As set forth below, Mr. Mercede submits that his criminal history category should be a Level I rather than a Level III because his two misdemeanor DUI convictions overstate the seriousness of Mr. Mercede's criminal history and the likelihood that he will commit other crimes. This would result in an advisory guideline range of 57-71 months, and Mr. Mercede requests that this Court impose a sentence of 57 months. Additionally, the Probation Office concluded that Mr. Mercede's "mental health and substance abuse may be grounds to vary from the recommended guideline sentence. (PSR ¶ 160.)

C. Application of Sentencing Factors

The various sentencing criteria of 18 U.S.C. § 3553(a) are set forth below and applied to Mr. Mercede and the offenses at issue.

1. Nature and Circumstances of the Offense and History and Characteristics of Mr. Mercede (§ 3553(a)(1))

Mr. Mercede's personal history and characteristics and the offenses at issue are set forth above. Mr. Mercede does not seek to justify or excuse his actions. He acknowledges that he used exceptionally poor judgment and that this will continue to have profound consequences for himself, his family, and others.

2. Sentence Must Reflect the Seriousness of the Offense, Promote Respect for the Law, and Provide Just Punishment (§ 3553(a)(2))

Mr. Mercede acknowledges that he committed serious offenses and that this should be treated accordingly. It is significant, however, that the offenses were non-violent in nature. Indeed, last year the Sixth Circuit affirmed a sentence of one day of imprisonment, five years of supervised release with 24 months of home confinement, and a $250,000 fine – a sentence that was well below the applicable guideline range of 57 to 71 months – for one count of bank fraud, two counts of wire fraud, and one count of conspiracy to commit bank and wire fraud. *See United States v. Musgrave,* 647 Fed. App'x 529 (6th Cir. 2016).

Regardless of this Court's sentence, Mr. Mercede has already been and continues to be punished for his offense. As a result of his guilty plea, Mr. Mercede has gone from being a respected member of his community to a convicted felon. He will now be unable to exercise certain civil rights, such as the right to vote. Moreover, this case has garnered negative publicity for Mr. Mercede in news articles published in print and online that will forever tar Mr. Mercede as a felon. For those who do not know him, he will now be best known and remembered for his conviction.

Respect for the law is undermined both by sentences that are too short and sentences that are too long. A prison sentence of 57 months is significant, especially in light of the fact that Mr. Mercede's actions in this matter appear to be entirely out of character according to those who know him best. Indeed, Mr. Mercede's friend from college, Ahmad Iqbal, states emphatically that "[t]o the extent Dan had victimized other people, this is completely against character." Alicia Mercede, Mr. Mercede's wife, similarly notes that "these charges against Daniel strikes me as a completely out-of-character offense," and she says that "as Daniel's first criminal charge and conviction, I have seen how he sincerely regrets having committed this crime."

3. General and Specific Deterrence (§ 3553(a)(B) & (C))

Data from the U.S. Sentencing Commission shows recidivism is unlikely given Mr. Mercede's personal characteristics.[3] Specifically, this government data shows that only 8.8% of individuals with a college diploma recidivate, and married offenders are also significantly less

[3] *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (2004), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf

likely to recidivate (13.8%). (*Id.* at 12.) There is also "no apparent relationship between the sentencing guideline final offense level and recidivism risk." (*Id.* at 13.) Moreover, individuals sentenced for fraud offenses had the lowest risk of recidivism (16.9%). (*Id.*)

These facts underscore the reality that both general and specific deterrence is best promoted when a court exercises its discretion to fashion a sentence employing forms of punishment beyond simply imprisonment. There is no danger that Mr. Mercede will commit another crime in the future because Mr. Mercede's conduct here is an aberration, and his primary goal is to re-build a life with his wife and son upon release. Mr. Mercede's sentence should therefore reflect his low risk of recidivism. *See United States v. Marshall,* 870 F. Supp. 2d 489, 495 (N.D. Ohio 2012) ("An individual with a low risk of recidivism does not need a lengthy incarceration for the protection of the public."); *United States v. Stern*, 590 F. Supp. 945, 958 (N.D. Ohio 2008) (imposing below-Guidelines sentence based in part on low level risk of recidivism); *United States v. Smith*, 275 Fed. App'x 184, 188 (4th Cir.2008) (per curiam) (finding a below Guidelines sentence appropriate in part because of the defendant's "low risk of recidivism"); *United States v. Martin*, 520 F.3d 87, 90 (1st Cir. 2008) (same).

A sentence of 57 months is also a significant deterrent to others not to engage in similar conduct. Mr. Mercede has already lost the life that he built and has caused his family untold suffering. Mr. Mercede will be separated from his wife and six-year-old son, Caleb, for many years. This separation will come during Caleb's formative years, at a time where he desperately needs a loving and devoted father. Keeping this separation to a minimum should be an important consideration.

4. Provide Education, Training and Care (§ 3553(a)(2)(D))

The Presentence Investigation Report includes facts that suggest Mr. Mercede requires mental health and addiction counseling services during any period of incarceration. Mr. Mercede's was diagnosed by a psychiatrist, Dr. William P. Fikter, M.D., for cocaine dependence, alcohol dependence, and anxiety disorder. (PSR ¶ 110.) Significantly, Mr. Mercede has been under the care of a psychologist, Kathy Daum, since June 14, 2013. (PSR ¶ ¶ 110.) In a letter to this Court, Ms. Daum states that throughout the therapy process Mr. Mercede:

> has been open and willing to address recovery issues, including but not limited to, relapse prevention, increasing impulse control, increasing mood stability, reducing agitation, remaining abstinent from all mood and mind altering chemicals. Daniel has also actively participated in any and all recommended interactions, assignments and has attended all scheduled appointments.

Ms. Daum further states that Mr. Mercede has "demonstrated a significant ability toward growth and change" and "shown a willingness to be accountable for poor choices and consequences."

The Probation Office concluded that Mr. Mercede's history of mental illness and substance abuse may be grounds to vary from the recommended guideline sentence. (PSR ¶ 160.) The Probation Office's assessment is consistent with holdings of the Sixth Circuit and other courts across the country that have held a variance is appropriate for defendants suffering from substance abuse or mental health issues. *See, e.g., United States v. Hairston,* 502 F.3d 378 (6th Cir. 2007) (holding that imposition of sentence that was 51% below the guideline range was not substantively unreasonable when defendant who struggled with drug addiction maintained sobriety); *United States v. Fletcher,* 15 F.3d 553, 557 (6th Cir. 1994) (affirming downward departure based in part on defendant's "attempts to deal with his alcohol problems"); *United States v. Ray,* 375 F. Supp. 2d 832 (S.D. Iowa 2005) (imposing sentence that was 50% below the guideline range based in part on defendant's mental health and drug addiction); *United States v.*

Wyatt, 442 F. Supp. 2d 298 (W.D. Va. 2006) (holding sentence of 60 months' imprisonment, less than the advisory Sentencing Guidelines range of 121-151 months, was appropriate based in part on history of substance abuse, mental illness, and family support).

In light of Mr. Mercede's documented substance abuse addiction, he also requests that this Court recommend his admission to the RDAP program at an appropriate BOP institution to allow him to maintain the progress he has made toward sobriety. The BOP's own website underscores that rigorous research supports the value of the RDAP program to both inmates and society:

> The Bureau and National Institute on Drug Abuse combined funding and expertise to conduct a rigorous analysis of the Bureau's RDAP. Research findings demonstrated that RDAP participants are significantly less likely to recidivate and less likely to relapse to drug use than non-participants. The studies also suggest that the Bureau's RDAPs make a significant difference in the lives of offenders following their release from custody and return to the community.[4]

5. Kinds of Sentences Available (§ 3553(a)(3))

Mr. Mercede's offenses fall within Zone D of the Sentencing Table. U.S.S.G. § 5C1.1(f) contemplates a Zone D offense being satisfied through imprisonment, and the Plea Agreement states that "[t]he sentence for the offense charged in Count 1 may not be satisfied by a term of probation and must include some period of imprisonment." (Plea Agreement ¶ 3.) Under the Plea Agreement, however, this Court can impose any sentence it believes appropriate under the facts and circumstances of this case. This Court has discretion to select from a wide range of sentencing options, including imposing a split sentence pursuant to which up to one-half of the recommended sentence may be served through home or community confinement.

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[4] BOP website, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp.

6. Sentencing Guideline Considerations (§ 3553(a)(4) & (5))

Pursuant to the Plea Agreement, the parties agreed to recommend that the applicable total offense level is a 25 under the USSG after taking a three-point reduction for acceptance of responsibility and a one-point reduction for substantial assistance. (Plea Agreement ¶¶ 17, 18, 20-21.) The parties, however, "have no agreement about the Criminal History Category applicable in this case." (Plea Agreement ¶ 19.) Rather, "the Criminal History Category will be determined by the Court after the completion of a Pre-Sentence Investigation by the U.S. Probation Office." (*Id.*)

The Presentence Investigation Report concludes that the applicable offense level is a 25, Mr. Mercede's Criminal History Category is a Level III, and the relevant sentencing range under the Guidelines is therefore 70 to 87 months. Specifically, the Presentence Investigation Report calculates Mr. Mercede's Criminal History Category as a Level III because Mr. Mercede has one criminal history point arising from a 2012 misdemeanor conviction for operating a vehicle while impaired, one criminal history point arising from a 2013 traffic conviction for DUI-Alcohol/Drugs, and an additional two criminal history points for committing the instant offenses while on probation for the 2013 DUI. (PSR ¶¶ 85, 87, 90.)

USSG § 4A1.3(b) provides that a downward departure may be warranted if "the defendant's criminal history category substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." The Sixth Circuit has likewise affirmed two-level reductions in a criminal history category as reasonable when the criminal history calculation "overrepresented the seriousness of [defendant's] criminal history and the likelihood of his committing additional offenses." *United States v. Williams,* 432 F.3d 621, 623 (6th Cir. 2005).

Here, Mr. Mercede submits that a Criminal History Category of Level III – though correctly calculated – is inappropriate because the two misdemeanor DUI convictions overstate the seriousness of Mr. Mercede's criminal history and the likelihood that he will commit other crimes. Indeed, the Level III Criminal History Category reflects Mr. Mercede's struggles with alcohol addiction rather than his propensity for criminal activity. Accordingly, Mr. Mercede's criminal history category is more appropriately a Level I, where the applicable sentencing range is 57 to 71 months rather than 70 to 87 months.

7. Avoid Sentencing Disparities (§ 3553 (a)(6))

In weighing potential sentencing disparities, this Court should look beyond sentences imposed within this district and consider how sentences have been imposed nationwide in similar cases. *See United States v. Frazier,* No. 12-3887, 2013 WL 6224032, at *7 (6th Cir. Dec. 2, 2013) ("It is a national disparity, not a disparity between particular defendants that must be avoided.") The sentencing data made available by the United States Sentencing Commission is particularly helpful to determine nationwide sentencing norms and averages in fraud cases. *See, e.g., United States v. Smith,* No. 1:06-CR-00394, 2009 WL 2497174, at *5 n.1 (N.D. Ohio Feb. 2, 2009) ("[T]he court finds the statistics to be helpful in providing a rough sketch or sentencing norms and averages.")

For the Fourth Quarter of Fiscal Year 2016 (i.e., October 1, 2015 through September 30, 2016), the Commission reported that there were 6,470 fraud offenses.[5] (Table 1.) Of these, 71.8% received a sentence consisting solely of imprisonment, and the median length of imprisonment was 13 months. (*See id.* at Table 6, 7.) A full 29.1% of fraud offenses were

[5] United States Sentencing Commission Quarterly Data Report, 4th Quarter Release, Preliminary Fiscal Year 2016 Data Through September 30, 2016, Table 1, available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_16_Final.pdf.

sentenced below the sentencing range where the government did not sponsor a below-range sentence. (*Id.* at Table 10.) ***All told, 55.1% of the defendants sentenced for fraud offenses received sentenced below the applicable Guideline range.*** (*Id.*) This data shows show that numerous federal courts have imposed alternative sentences using their post-*Booker* discretion, particularly in the context of fraud offenses.

8. Restitution to Victims of Offense

Mr. Mercede is committed to paying full restitution ($447,347.96) to victims of his offenses. (*See* PSR ¶ 141.) The Pretrial Investigation Report, however, demonstrates that Mr. Mercede does not have the financial resources to pay any restitution at this time (*see id.* ¶ 125), in part because he has been on home detention since last April and is therefore unable to obtain employment. Mr. Mercede will work hard to the best of his abilities to fulfill his restitution obligations upon release, and his victims will ultimately benefit financially from this Court's imposition of a lenient prison sentence. This fact is underscored by the first-hand observations of Mr. Mercede's college friend, Ahmad Iqbal, regarding his observations of Mr. Mercede's talent and abilities:

> But what I do know is Dan has an incredible ability to be useful and add value. He has an enterprising mind for problem solving. I remember as university students we were looking to get certain TV channels that were not available on cable, but these channels required having a satellite dish. Seeing as we couldn't afford to buy a satellite dish, Dan went out, got the parts, and built one himself! … Furthering my knowledge of Dan, reading about all the things he has pled guilty to, the sophistication, research and tactics that must have been used, he knows how to put things together and solve problems. If he applied these skills and dedication and resolve towards something productive, I have no doubt his community will be better off.

IV. RECOMMENDED SENTENCE

For the foregoing reasons, Mr. Mercede respectfully requests that this Court impose a sentence of 57 months, which is the lowest end of a base offense level of 25 and a Level I

Criminal History Category. The Presentence Investigation Report also concludes that Mr. Mercede's mental health and substance abuse issues may be grounds to vary from the recommended guideline sentence. Mr. Mercede further requests that this Court recommend his admission to the BOP's Residential Drug Abuse Program ("RDAP") to allow him to continue to maintain his sobriety.

V. CONCLUSION

Mr. Mercede accepts full responsibility for his wrongful actions. He knows he made the wrong decisions and blames no one but himself for what he did. He acknowledges the need for the sentence to reflect the seriousness of the offense, respect for the law, and just punishment. Mr. Mercede asks only that this Court consider the totality of the circumstances when rendering its sentence.

Respectfully submitted,

/s/ Richard H. Blake

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 14, 2017, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's ECF system.

/s/ Richard H. Blake
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